

WWSC

1450 AM



Normandy Broadcasting Corporation

49.6 FM WYLR

AN AFFILIATE OF THE AMERICAN BROADCASTING COMPANY

217 Dix Ave., Glens Falls, NY 12801 • 518-793-4444 • Fax 792-3374

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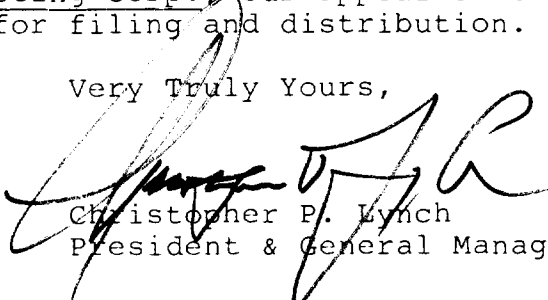
January 26, 1993

Mrs Searcy
Secretary of the FCC
1919 M Street, N.W.
Washington, D.C. 20554

Dear Mrs. Searcy,

Enclosed for filing please find an original and 14 copies of the Exceptions of Normandy Broadcasting Corp. our appeal of the Initial Decision in this case as tendered for filing and distribution.

Very Truly Yours,


Christopher P. Lynch
President & General Manager

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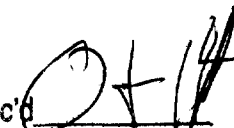
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Before the
Federal Communications Commission
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

MM Docket No. 92-6

In re Applications of

NORMANDY
BROADCASTING CORP.

File No. BRH - 910129UR

For Renewal of License of
Station WYLR(FM) (95.9 Mhz)
Glens Falls, New York

and

LAWRENCE N. BRANDT

File No. BPH - 910430MB

For a Construction Permit for
a new FM Station on 95.9 Mhz
at Glens Falls, New York

To: The Review Board

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FEDERAL COMMUNICATIONS COMMISSION
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EXCEPTIONS OF NORMANDY BROADCASTING CORPORATION

NORMANDY BROADCASTING CORPORATION ("Normandy"). by it's President, submits its Exceptions to the Initial Decision of Administrative Law Judge Richard Sippel, released Dec. 30, 1992.

I.

Preliminary Statement

1. Normandy will show, by a preponderance of evidence that it has served the ascertained needs of its community over the license period, and has earned its presumption of renewal for both stations. It will show that grievous errors were made both in Skidelsky and Brandt, errors that demand reversal of both I.D.'s. It will show beyond any reasonable doubt that the needs and interests of its community will be best served by the award of the licenses to Normandy, to continue a family tradition of exceptional community service started in 1959, and now entering its third generation.

II.

Argument

Skidelsky Et Al

2. Normandy has long held that its service must be judged by its overall performance. Its two stations have worked in combination over the license period, together providing an extraordinary quantity of Public Affairs, Public Service, News and Emergency services and fundraising leadership documented by its original threshold, community affidavits, proffers and letters (ID paragraph 40, Direct Case Exhibits 3,6,9,11) and the sworn, uncontroverted testimony of its witnesses throughout Brandt et al. (ID Para. 40). By excluding WWSN's service and by rejecting incontrovertible WYLR programming evidence, these cases have distorted Normandy's performance and ignored evidence that demands award to Normandy.

. Skidelsky et al Issue: Transmitter Site

3. As argued in Normandy's Exceptions in Skidelsky and redefined herein, by dismissing out of hand the sworn, uncontroverted evidence of Normandy, the judge has erred in law, and in his setting of evidentiary standards

"A party having the burden of proceeding has come forward with a prima facie and substantial case, he will prevail unless his evidence is discredited or rebutted." (H.R.

Report No. 1080, 79th Congress Second Session 137 (1941).)

The judge's representation that a declaration by a Mr. Abess stated

that neither "Mr. Lynch nor anyone...had spoken to him about using his land" is patently untrue. In the light of enormous evidence that Abess' land was posted as available as were numerous other parcels in the area it is ridiculous to think that Lynch did not make a 10-minute call as he swore he did under oath. The Abess note, handwritten, unsworn and unnotorized, states simply that he "couldn't remember" his conversation three years earlier with Lynch - understandable for a gentleman about 70 years of age at the time. In his Proposed Findings of Fact (MM90-181 page 12), Mr. Tillotson simply misstated the contents of the Abess note, and Judge Kuhlman accepted this misstatement as fact. As the Honorable Mr. Blumenthal and Marino have promised to do (Transcript Docket 90-181 dated 8/16/91 pp. 1292-5) it is now time to check the record and right this incredible wrong visited upon Normandy. As a matter of law, this finding must be reversed.

Skidelsky Issue: Material Misrepresentation/Poor Record

4. Judge Kuhlman has inadvertantly distorted the record. Saying that Lynch "was not concerned about accuracy" is simply untrue (ID par. 16). Skidelsky Transcript #881 straightforwardly explains that Lynch never would have purposely misstated facts - especially facts so open to scrutiny. This error totally undermines Judge Kuhlman's conclusions. The errors in threshold are largely minor ones e.g. not subtracting commercial time from news or public affairs (ID Para. 18) and clerical errors such as misplaced apostrophe (Para. 16) and errors in documentation (Para. 23, 24). These errors have been honestly explained, the documentation procedures for both logs and public files have been augmented to be accurate in the future (and under lock and key to prevent possible theft in the future), and the programming of WYLR reconstructed through sworn uncontroverted testimony in Brandt to reflect the truth, and exculpate fully this finding of Skidelsky. The record now shows approximately 6% WYLR non-entertainment programming, and a fine record of public service over the license period. The finding of Skidelsky must be reversed in light of the sworn record in Brandt. Normandy's threshold was an honest attempt to gain credit for an exceptional broadcast record spanning two decades. Even with the errors - some of which were not in Normandy's favor - it documents excellent programming overall. At worst, the threshold reflects staff and management errors at Normandy and nowhere does the ID find any intent to deceive.

Skidelsky Issue: Misrepresentation or Lacking In Candor

5. Normandy holds it is absurd to claim that Normandy purposely withheld anything regarding Normandy's ownership. Having produced reams of information in Discovery, if Normandy erred in not producing this one document, so be it. However, there is no conceivable motive advanced - no gain would exist in withholding it. Neither was there any hint of an intent to deceive, and this oversight was promptly cured by the voluntary production of this document and Normandy's submission to written interrogatories. In this very same proceeding, Bradmark withheld a signed brokerage contract purporting to sell both

its current stations and the B-1. said contract only coming into light involuntarily at the trial, a situation obviously violating production orders. If Normandy erred, it was an honest mistake voluntarily corrected by Normandy itself. How this proceeding rejected Normandy's explanation and awarded the license to Bradmark reflects ongoing prejudice which taints Skidelsky from its beginnings to this very day.

III.

Renewal Expectancy

6. Even by the most cursory reading. Normandy had proven by an enormous preponderance evidence of that WYLR has operated strongly in the public interest before, during and after the license period. In Judge Sippel's Findings of Fact, WYLR weekly broadcast 55 local newscasts (Para. 21), Emergency Weather when warranted (Para. 22), about 100 PSA's, half local, weekly (Para. 23), and approximately 40 separate fundraisers or public affairs programs, many of them annual events (Para. 36, 37, 43, 45, 46, 47). Again as in the Transmitter Site issue, the court has ignored evidentiary standards that are a matter of law. The evidence on programming in Normandy Exhibit 6 and as testified to by Lynch, was corroborated by the affidavits and sworn testimony of two Normandy employees: Thomas Jacobsen and Richard C. Dusenbery (ID Para.48). This sworn evidence reflects 5.75% nonentertainment programming in the first six programs alone, a list of public affairs programs innovatively designed to meet ascertained needs (Transcript 617-633), and completes a proffer of programming which is a source of pride. It is noted that Normandy's public affairs programs (para. 36, 37, 43, 45, 46, 47) conform exactly to the definition of Brandt's attorney (ID Para. 13) as "specific programs allotted a specific time...in a week, month or whatever devoted specifically to one issue." In reaching his decision ALJ Sippel makes a number of factual errors. In Para. 25 he states the quarterly "lists (which) were the source for Normandy's schematic representations" e.g. Exhibit 6. Normandy has stated repeatedly that while Normandy did not keep adequate lists for the time in question, Exhibit 6 accurately reconstructs representative programming over the license period (Transcript 523-524). Later in Para. 25, Judge Sippel accuses Normandy of not responding to a lack of PSA's over a two year period. Throughout this proceeding Normandy has acknowledged inadequate record-keeping but has offered both evidence and sworn testimony as to its public service over the term (Normandy Exhibit 6, 9, 11, Brandt Transcript 617 - 33, 677 - 694). In Para. 20 Judge Sippel states that Normandy simulcasts. This is untrue, and unsupported by the record. In Para. 26, we protest Judge Sippel's editing of Lynch's sworn testimony. Later, referring to this misquote, he finds at times nothing was on the FM for public service, and the record shows this is untrue as Lynch was only testifying here as to his files, not his programming. In Para. 27 Judge Sippel's finding that there has not been a consistent broadcasting of PSAs on WYLR based on the "admissions of Lynch" is patently untrue. It contradicts his finding (ID Para 23) and he cites no record for these "admissions" and ignores sworn testimony otherwise such as in Transcript 597-604. He gives no credit for "Tri-County Notebooks"

which were read live over the license period, not just 1990 and 1991. The live reads detailed local meetings, fundraisers, etc.. ID Para 43 reflects evidence that shows they were run. There are no "internal inconsistencies." Tri-County Notebooks are in fact separate from WYLR's Psas. They have helped countless worthy groups. "Pushes" are at the front of every major fundraiser or event WYLR broadcasts. Fifteen to 45-second announcements for local fundraising or public affairs events, they helped raise literally hundreds of thousand of dollars for local groups in need. All these vital elements in Normandy's public service are ignored in Para. 27. Normandy receives neither credit for PSAs over the term nor Public Affairs. Judge Sippel is in error: WYLR should be awarded credit and renewal presumption based in part on these innovative programs designed to meet community needs.

In Para. 30 Sippel commits another grievous error. He states "Lynch admits to having understated WYLR's entertainment programming by a factor of 32%." The sworn statement says Lynch understated Normandy's nonentertainment by 32% destroying his entire premise (Normandy Exhibit 7). In like manner quoting the Skidelsky ID he states Lynch was "not concerned with the truthfulness..." Again, the transcript shows Lynch was simply explaining he would never have purposely misstated his programming to the FCC, as any inaccuracies could have been discovered easily by Normandy's competition.

7. Normandy's Exhibit 7 should never have been rejected. It provides strong mitigating evidence on Skidelsky and mitigating evidence totally unrelated to Skidelsky, most notable Lynch's sworn statement that logging errors and Public Affairs Issue files errors would not be repeated again (Exhibit 7, Para. 6). There is no "arrogance" in Normandy's pleadings. Rather, there is a humble acceptance of the fact that mistakes were made, and a sincere effort to explain them and the corrective actions taken. In Brandt, Lynch has sworn that upgraded logging techniques are in place. (Transcript 593). Similarly, in Transcript 679, 680, when Lynch sought to put further mitigating evidence on upgraded logging and public file systems on the record from Mr. Jacobsen who had firsthand knowledge, he was denied the opportunity, even though the subject was a part of Brandt's examination (Trans 593). In ID Para 58 Normandy was denied mitigation because it did not make an affirmative showing that it had made a positive effort to correct its record-keeping. Judge Sippel erred in not allowing this evidence to be put even more fully on the record. To clear up any misunderstanding, Normandy states unequivocally it has upgraded its record-keeping, and Normandy logs and public files are accurate, detailed and now, well-catalogue its community broadcasting efforts for both stations to include daily (three on Monday) checking of logs by management personnel and continual review of Normandy's public file by Lynch.

8. Judge Sippel's categorizing in ID Para. 32 as "improper and tampering" a couple of marginal handwritten notes on an affidavit and his characterization of this as a "continuing disposition" of Lynch to "alter the truth" (ID Para. 60) is patently illogical. Lynch had a two-year-old affidavit from Borgos, the Queensbury Supervisor, used in Skidelsky but rejected as evidence in Brandt. Lynch sought an updated affidavit from Borgos for use in establishing WYLR's superior

programming. In this line, trying to sift through literally hundreds of letters and not make any detail errors Lynch made notes on three items that WYLR broadcast along with WWSC, to remember to ask if Mr. Borgos could testify in this regard. Because of time constraints, Borgos was never contacted and the original document was used only in Normandy Exhibit 3, again to establish Lynch's community integration only and Lynch did forget to erase these notes. Nonetheless, the WYLR notes would serve no purpose for Normandy. This situation was straightforwardly explained by Lynch under oath. and any reasonable person could see that if Normandy intended to deceive it would have done a better job. In fact, WYLR did broadcast the three (not two) noted events, and there is more than sufficient evidence on the record to support all three notations (News, Lake George Winter Carnival and LARAC Arts Festival). Sippel's argument of continuing intent is in error and illogical and must be dismissed. Thus, again we are in a parallel situation with WIOO Inc., 95 FCC 2nd 974, 983 (Comm's 1983), allowing and in fact demanding award to Normandy. Later in ID Para. 32, as judge Sippel decries a lack of focus towards mitigation, we disagree. Direct Case for Normandy Exhibit #3, 9 and 11 show extraordinary integration, the respect of Lynch's peers, and evidence as to the superior programming of both stations that show extraordinary mitigation by their very nature. Judge Sippel's own standards in ID Para. 53 cry out for award to Normandy, as Normandy has shown repeatedly it broadcasts to the public interest and that its alleged misdeeds are totally without willfulness, isolated incidents within a fine 34 year record as an FCC licensee and not current as envisioned by FCC Law. see Character Qualifications supra at 1227.

9. In ID Para. 33, Judge Sippel misses the focus of Normandy Direct Case Exhibit 11. There is nothing "marginal" about helping raise \$52,686 for the March of Dimes, fighting drug abuse in one's own community or in other works noted in Exhibit 11. It is the essence of good community broadcasting as such Exhibit 11 has strong weight both in mitigation and in establishing superior renewal expectancy. While arbitrarily limiting Normandy to only 25 letters to establish renewal expectancy, as delineated in ID Para. 49, WYLR specifically supported the poor, the handicapped, the environment, emergency community services, veterans, the jobless and more, specifically focusing on meeting its ascertained community needs. Judge Sippel erred in limiting Normandy to only 25 letters and by only giving this strangled exhibit minor weight. It deserves more, both to mitigate Skidelsky and to augment the preponderance of evidence on record as asked for by Judge Sippel (ID Para 7) in order for Normandy to prevail.

IV.

Conclusions

10. Mitigation. "Can Normandy be trusted?" is the ultimate question (ID Para. 52). In the final analysis

(An) applicant involved in serious misconduct might have its application granted if it could show the ability to operate in the public interest with no likelihood of future misconduct. ID at 7229

Normandy has not only mitigated Skidelsky, but has here, the first opportunity possible, plausibly denied and refuted every allegation categorically including the "Borgos" issue. In Character Qualifications supra at 1232. "direct evidence of an applicant's behavior outweighs predictive judgements based on intrinsic evidence of an applicant's character." There is no evidence anywhere in record that Normandy ever deliberately made misrepresentations to the FCC. In WWSC and WYLR there is enormous evidence that these stations were run constantly focused on community needs by their working owner. There is enormous sworn testimony from Normandy's community as to the character and community work of Lynch. Normandy and WYLR. In 34 years, there has never been one word outside these proceedings, that Normandy cannot be deemed a trustworthy licensee. The evidence of Normandy's continuing ascertainment over the license period and the programs run to meet these needs, the addition to the record of Public Affairs programming in Normandy Exhibit 6 and the testimony of Lynch, Dusenbery and Jacobsen, the sworn testimony of Lynch regarding new and more secure record-keeping systems put into place since Skidelsky, clearly overcome the adverse inference of future conduct inferred by the Skidelsky ID. Can Normandy be trusted? An enormous preponderance of evidence says yes.

11. Renewal Expectancy. Beyond any reasonable doubt Normandy has established that WYLR has earned renewal expectancy. Almost 6% basic nonentertainment programming, aggressive PSAs, TriCounty Notebooks and "pushes," along with consistent fundraising and sponsorships throughout the license period, establish strong renewal expectancy by a wide margin. The facts are sworn to in Normandy's Direct case, substantiated by third party affidavits and letters and affirmed by the sworn, uncontroverted testimony of Normandy witnesses. The absence of classic "Public Affairs Discussion Programs" on WYLR is a total Red Herring. The FCC in its wisdom allows each licensee wide discretion in how to program to help its community. Running major blocks of local public affairs programming on sister station WWSC, Normandy met this obligation on WYLR through short ongoing public affairs discussions largely around its ongoing fundraising and sponsorships. Although, Normandy has added even more Public Affairs Block programming (Exhibit 6 "Recovery Radio") and taken great pains to document its ongoing public affairs programming since Skidelsky, the letters and accolades of our community leaders over the license period in the Normandy Direct Case testify eloquently to WYLR's enormous contribution to the community. Our claims for specific programming are neither "seat of the pants" nor "difficult to access." They are clearly set forth in Normandy's Direct Exhibit 6 in standard FCC format and they are sworn to in uncontroverted testimony. As a matter of law, they must be accepted as they are: a conservative reconstruction of WYLR's programming over the license period based largely on first hand knowledge. Standing unrefuted they must be accepted as fact.

12. Perhaps the most grievous error in this proceeding is Judge Sippel's acceptance (ID Para. 69) of Brandt's "quote" of Lynch (Brandt PFC at 10). Lynch admitted... PSA's aired by WYLR were "minimal." A reading of the Skidelsky transcript at p. 733-4 shows Lynch said nothing of the of the sort and was only discussing illegible

handwritten notes on a document. Further, the Brandt quote that "Lynch made no effort to develop and air WYLR programs responsive to community problems" (Brandt PFC at 11) is outright false. In Transcript p. 1019-1020, Lynch states just the opposite and on page 1026 explains WYLR's methodology in meeting community needs. This methodology and its results for the community are a matter of record in both Normandy's Exhibits and testimony. Again, the truth demands award of renewal expectancy.

13. Normandy's Failures Defeat a Proposed Policy. These cases do nothing less than support the proposed policies strongly. The loss of the B-1 and the enormous burden of this case should stand as a strong warning to every FCC licensee as to the importance of maintaining a complete public file, and keeping it secure. Since Skidelsky, Normandy's logs and public file could serve as a model in the industry. Certainly Normandy has learned a lesson.

14. Normandy's Failure to Provide A Substantial Format. There are no legal or logical grounds to not accept the representations of Normandy and the Mass Media Bureau that Normandy's Direct Case Exhibits, sworn testimony, and community affidavits and letters prove beyond a reasonable doubt that a substantial format was aired throughout the license term and beyond. Although, Judge Sippel erred in Para. 77 by crediting Normandy with only 20 weathercasts per week (correct number 120 Normandy, Exhibit 6), the program elements he lists gives Normandy about 4% weekly nonentertainment - even with no credit to sports or TriCounty Notebook or the weather. Judge Sippel forgets that the FCC did away with programming percentages in 1981. It is well established through sworn testimony, that Normandy's programming both discussed and met the ascertained problems of its community. His findings that the format "excludes nonentertainment programming that is 'substantially above' newscasting, weather forecasting, fundraisers and PSA's" (ID Para. 76) is both in error and not germane to proving a "Substantial Format." If Normandy decides it can fight drug abuse better with five or ten short interviews that will interest its listenership (given the demographic) rather than a drawn out panel discussion, that is Normandy's decision to make, so long as it meets ascertained community problems. The testimony of Lynch, Trans. 614-633 incontrovertibly establishes programming over the license period met ascertained needs as does the testimony of Mr. Jacobsen (Trans. 677-694). As called for, (5 U.S.C. Sec. 556 (D)) Normandy has supplied "reliable, probative and substantial evidence" throughout its Direct Case and the sworn, unshaken testimony of its principals and employees. The record shows substantial locally produced programming, run largely in premium times, directed at local needs and interests, said programming giving Normandy superb reputation in its community. The law (WABZ Inc. 90 FCC 2nd 818, 840-42, Comm'n. 1982) demands a finding of substantial format and the award of a strong renewal preference.

V.

Comparative Analysis

15. Comparative Analysis. Normandy argues for award of superior renewal expectancy that would make further analysis moot. Even though, Normandy has been awarded "100% credit for integration," "substantial qualitative credit for Lynch's long-term residency," "significant credit for significant civic activities" and a "slight qualitative credit for Lynch's experience." ID Para. 81. Brandt receives no such credits. Thus the ultimate question is the weight to be accorded a single diversification credit to Normandy. Mathematically Normandy should prevail. Further in FCC policy, the importance of diversification is equal to providing "the best practicable service to the public." (FCC 65-689 Pol. Statement). Would the community be better served by Brandt who, as published in the January 23, 1993 edition of the Post Star, according to his counsel

"...has no plans to move up to the area, and is considering the station as a business decision. Brandt did not have any particular interest in Glens Falls, other than the fact the station's license was available, according to Tillotson. "He's a businessman and he's looking for a good investment," Tillotson said. He added that any decisions on what format a Brandt station would have, or what he might do with WYLR employees, have not been made yet."

It is illogical to think an absent owner like Brandt would provide better service to the community than Lynch, virtually a lifelong resident who has dedicated his entire professional life, at a heavy personal cost, to serving Glens Falls, especially as Normandy begins its third generation of family involvement. Even if Skidelsky stands, even without more than a minor presumption of renewal, beyond any reasonable doubt the public interest would be vastly better served by the award, consistent with FCC policy, of WYLR to Normandy.

VI.

Summary

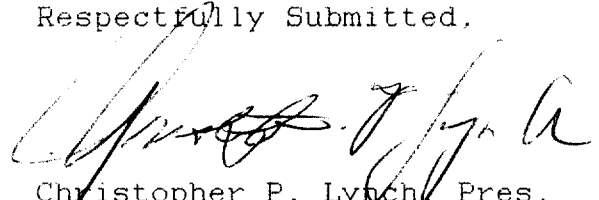
16. The sole original purpose of the FCC was to allocate the airwaves in a manner that would best serve the public interest. We submit that in Brandt there is only one decision consistent with the execution of this public trust.

The facts of the case are simple. There were simple paperwork errors - regrettable, perhaps stupid, but none even hinted to be purposeful. A sharp aggressive attorney found someone to start up a second front to advance the interests of his primary client, Bradmark Broadcasting in pursuing the Skidelsky B-1. Outside of these self-interested pleadings, there has never been so much as a word questioning Normandy's or Lynch's integrity and it is obvious the FCC can rely on Normandy in the future to be a trustworthy licensee meticulous in its record-keeping and community service. The record is clear. Normandy is two stations, running quality local programming,

consistently meeting the ascertained needs of its communities. For reasons enumerated, the evidence should exculpate the Skidelsky findings - not just mitigate them. Moreover, through hard work of its principals and employees WYLR has earned its strong presumption of renewal and should be awarded its license.

It is time to allow good community broadcasting to remain in Glens falls and for the Review Board to correct this incredible string of wrongs. As a matter of law, as a matter of common sense, and in the name of justice and decency we respectfully urge the granting of Normandy's licenses.

Respectfully Submitted,



Christopher P. Lynch, Pres.
Normandy Broadcasting Inc.

CERTIFICATE OF SERVICE

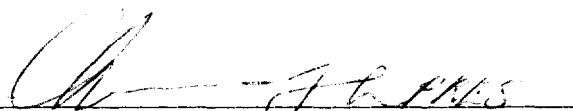
I, Christopher P. Lynch, President and General Manager of Normandy Broadcasting Corporation do hereby certify that a copy of the foregoing EXCEPTIONS OF NORMANDY BROADCASTING CORPORATION has been sent via U.S. First-Class Mail postage prepaid this 25th day of January, 1993 to the following:

Paulette Laden, Esq.
Gary Schonman, Esq.
Federal Communications Commission
Hearing Branch, Enforcement Division
2025 M Street, N.W., Room 7212
Washington, D.C., 20554

David Tillotson, Esq.
3421 M Street, N.W.
Suite 1739
Washington, D.C. 20007

Review Board
C/O Secretary of the FCC
1919 M Street, N.W.
Washington, D.C. 20554

Review Board
2000 L Street, N.W.
2nd Floor
Washington, D.C. 20554



Christopher P. Lynch